

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS.  
SOUTHERN DISTRICT

SUPERIOR COURT

NO. 04-S-104

STATE OF NEW HAMPSHIRE

v.

TIMOTHY GEDDES

OPINION AND ORDER

LYNN, C.J.

This case raises important questions concerning the construction of New Hampshire's gun laws.

The defendant, Timothy Geddes, has been indicted by the grand jury for violating RSA 159:10 (2002) by "knowingly [selling] a .22 caliber Smith and Wesson pistol to another person without being licensed to do so." The defendant has moved to dismiss the indictment on the grounds that it fails to allege a crime because, in his view, only a person who is engaged in the business of selling pistols or revolvers is required to be licensed, and the indictment fails to allege that Geddes was engaged in said business. The State advances two arguments in opposition to the motion to dismiss. First, the State asserts that the licensing requirement is not limited to persons engaged in the business of selling pistols and revolvers. Second, the State argues that even if the statute is so limited, the indictment is facially valid and the burden is upon the defendant to prove that he was not engaged in the business of selling pistols and revolvers. I conclude that the defendant's position is correct and therefore grant the motion to dismiss.

RSA 159:10 provides that “[a]ny person who, without being licensed as herein provided, sells, advertises or exposes for sale, or has in his possession with intent to sell, pistols or revolvers shall be guilty of a class B felony if a natural person, or guilty of a felony if any other person.” (Emphasis added.) The “as herein provided” language clearly is intended to reference RSA 159:8 (2002), which requires that a person desiring “to sell at retail pistols and revolvers” must obtain a license from the selectmen of a town or the chief of police of a city. The State concedes that, as originally enacted in 1923,<sup>1</sup> this statute required that a license be obtained only if a person was engaged in the business of selling pistols and revolvers. A license was not required for a person who made only occasional or sporadic sales of pistols and revolvers but was not a dealer in these firearms. See 1 N.H.Op.A.G. 224, 225 (1966) (wherein the Attorney General opined that if the licensing authorities “decide not to issue a license, such dealers or persons may not engage in the business of selling pistols and revolvers and by doing so they would be subject to the prohibitions and penalties set forth in RSA 159:10” (emphasis added)). Indeed, it is obvious that if the legislature had intended to require anyone selling a pistol or revolver to obtain a license there would have been no reason to include the words “at retail” within the statute.<sup>2</sup>

---

<sup>1</sup> Laws 1923, 118:10.

<sup>2</sup> In addition to the use of the term “at retail,” other provisions of RSA chapter 159 also make it clear that its licensing requirement for the sale of firearms is limited to a person engaged in the business of selling pistols and revolvers. For example, RSA 159:8, I specifically states, “The business shall be carried on only in the building designated in the license or at any organized sporting show or arms collectors’ meeting sponsored by a chartered club or organization.” Similarly, RSA 159:8, II requires that “the license . . . shall be displayed on the premises where it can easily be read.” The

See, e.g., Winnacunnet Cooperative School Dist. V. Town of Seabrook, 148 N.H. 519, 525-26 (2002) ("When construing a statute, we must give effect to all words in a statute and presume that the legislature did not enact superfluous or redundant words.").

The State asserts, however, that the reach of RSA 159:8 (and, by reference, RSA 159:10) was expanded by the enactment in 1967 of RSA 159:14. The latter statute provides as follows:

**Exemption.** None of the provisions of this chapter shall prohibit an individual not licensed under the provisions thereof who is not engaged in the business of selling pistols and revolvers from selling a pistol or revolver to a person licensed under this chapter or to a person personally known to him.

In the State's view, the above statute had the effect of amending RSA 159:8 and :10 so as to require that all persons desirous of selling a pistol or revolver obtain a license before doing so even if they are not engaged in the business of selling such firearms. There are three problems with the State's position. First, while the language of RSA 159:14 could be read to suggest that there is some dichotomy between persons "licensed under the provisions [of this chapter]" and persons "engaged in the business of selling pistols and revolvers," the State has provided the court with no information suggesting that it is even possible for a person who is not engaged in the business of

(..continued)

clear import of this last provision is to require that the license be prominently displayed at a place that is open to, and where the license may be viewed by, members of the public -- the business premises of the licensee. Finally, RSA 159:10, the section of the law establishing a criminal penalty for sale without a license specifically uses the plural terms "pistols" and "revolvers," thus strongly supporting the notion that the prohibition is intended to apply only to persons who sell multiple weapons, i.e., those who are dealers in the pistol or

selling pistols and revolvers to obtain a license. The absence of any indication that municipalities have mechanisms in place whereby a person who desires to make an isolated sale of a pistol or revolver can obtain a license to do so strongly undercuts the notion that the legislature intended to require a license in such instances.<sup>3</sup>

Second and more importantly, New Hampshire's criminal code specifically states, "No conduct or omission constitutes an offense unless it is a crime or violation under this code or under another statute." RSA 625:6 (1996). But RSA 159:14 does not on its face purport to criminalize any conduct. Instead, the statute is written as an exemption for certain conduct from the provisions of other sections of RSA chapter 159. The difficulty is that, in the absence of RSA 159:14, none of the other provisions of RSA 159 affirmatively make it a crime for a person not in the business of selling pistols or revolvers to sell such a firearm without a license (whether or not the buyer is licensed or personally known to the seller).

Third, even if RSA 159:14 could be read to create a new crime, at most that crime would consist of the sale of a pistol or revolver to a person neither licensed nor personally known to the seller. Yet even assuming such a crime exists, this plainly is not the crime with which the defendant has been charged. The indictment contains no allegation that the person to whom the defendant sold the pistol was not licensed or personally known to the defendant, and the State conceded at oral argument that the

(..continued)

revolver trade.

<sup>3</sup> The hypothetical non-business license to sell discussed in the text is to be distinguished from a license to carry a loaded pistol or revolver, which is issued pursuant to RSA 159:6. Far from being hypothetical, licenses to carry are very real and are issued by chiefs of police on a regular basis throughout the

proof to be offered in its own case in chief will show that the person to whom the defendant sold the pistol was personally known to him.<sup>4</sup>

The State also argues that even if the license requirement applies only to those engaged in the business of selling pistols and revolvers, the indictment need not allege that defendant was in said business and it is the defendant's burden to prove the contrary at trial. In support of this argument, the State cites RSA 159:5-a (1996), which provides:

**Exceptions and Exemptions not Required to be Negated.**

In any complaint, information, or indictment, and in any action or proceeding brought for the enforcement of any provision of this chapter, it shall not be necessary to negate any exception, excuse, proviso, or exemption contained herein, and the burden of proof of any such exception, excuse, proviso or exemption shall be upon the defendant.

The flaw in the State's argument is that the prerequisite for licensure under RSA 159:8, i.e., that a person is engaged in the sale of pistols and revolvers as a business, does not constitute an "exception, excuse, proviso, or exemption" to the offense defined by RSA 159:10. Rather, it is an element of the offense. See RSA 625:11, III (1996) ("Element of an offense' means such conduct, or such attendant circumstances . . . as

(..continued)

State of New Hampshire.

<sup>4</sup> While conceding that the informant who purchased the pistol from the defendant was "personally known" to him, the State suggested at oral argument that the basis of the prior relationship between the defendant and the buyer was their joint involvement in drug dealing or other nefarious activities. Based on this assertion, the State went on to argue that the jury should be permitted to assess whether the buyer was an "appropriate" person to possess a firearm, and could find the defendant guilty if it found that the defendant sold the gun to "someone who should not have a gun." Because this "prosecutorial gloss" obviously finds no support in the text of the statute, it requires no further discussion.

(a) [i]s included in the definition of the offense.”). That is, a person not engaged in the business of selling pistols or revolvers does not need to rely on the “exemption” found in RSA 159:14 to render legal his unlicensed sale of a pistol or revolver; the conduct is legal simply by virtue of the fact that it has not been proscribed by the legislature. Unlike the Controlled Drug Act, RSA 318-B (1995 and Supp. 2003), the statute at issue in State v. Bell, 125 N.H. 425 (1984), on which the State also relies, the RSA 159 statutory scheme does not create a general prohibition against the sale of pistols and revolvers and then carve out certain limited exceptions for those who have obtained a license or who satisfy other specific criteria or conditions. Rather, with the exception of prohibiting sales or transfers to convicted felons and to minors, see RSA 159:7 and :12, RSA 159 places no restrictions on the ability of private citizens to sell pistols and revolvers as long as this is not done with such frequency or regularity as to constitute a business.

Because the indictment in this case contains no allegation that the defendant was engaged in the business of selling pistols or revolvers at retail, and thus was required to be licensed under RSA 159, it fails to allege all the necessary elements of a violation of RSA 159:10. See State v. Therrien, 129 N.H. 765, 770 (1987) (indictment must allege all the elements of an offense). Accordingly, the defendant’s motion to dismiss is hereby granted.

BY THE COURT:

September 28, 2004

---

ROBERT J. LYNN, Chief Justice